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MONTANA FIRST JUDICIAL DISTRICT COURT, LEWIS AND CLARK COUNTY

FT. HARRISON VETERANS RESIDENCE, Limited Partnership,)	Cause No. DDV-2012-356
)	
Petitioner,)	Judge: James P. Reynolds
)	
vs.)	FT. HARRISON VETERANS
)	RESIDENCE, L.P.'S RESPONSE TO
MONTANA BOARD OF HOUSING,)	THE MONTANA BOARD OF
)	HOUSING'S MOTION TO DISMISS
Respondent.)	PURSUANT TO MONT.R.CIV.P. 12(b)

Petitioner Ft. Harrison Veterans Residence, Limited Partnership ("Ft. Harrison"), by and through its counsel of record, hereby submits its response to the Montana Board of Housing's (the "MBOH") Motion to Dismiss Pursuant to Mont.R.Civ.P. 12(b). The MBOH's motion should be denied because the issue is not moot and the MBOH's decision is subject to the Montana Administrative Procedures Act ("MAPA"), or, alternatively, to non-MAPA review.

BACKGROUND

The federal government enacted 26 USC § 42 to allocate low income housing tax credits ("LIHTC") to the states to subsidize the construction of qualifying low income rental housing. The MBOH is the body responsible for allocating LIHTCs to qualifying Montana applicants. Federal law requires the MBOH to allocate credits in accordance with a properly developed and adopted Qualified Action Plan ("QAP"). 26 USC § 42(m)(1)(A)(i). The QAP must "set[] forth

selection criteria to be used to determine housing priorities of the housing credit agency which are appropriate to local conditions.” 26 USC § 42(m)(1)(B). The MBOH reviewed and distributed the 2012 QAP for public comment on August 23, 2011. The MBOH accepted public comment and approved the 2012 QAP on October 17, 2011, and the Governor of Montana approved the 2012 QAP on November 2, 2011.

On January 20, 2012, Ft. Harrison submitted its application to the MBOH for Montana LIHTCs. Ft. Harrison planned to develop a housing project to serve low income, homeless and/or disabled veterans and their families in historical buildings located on Fort Harrison, outside of Helena, Lewis and Clark County, Montana (the “Freedoms Path Project”). A total of 15 applicants submitted applications in the allotted time period.

As required by ARM 8.111.603(3), the MBOH held a hearing on February 13, 2012, to hear presentations from all applicants. Ft. Harrison presented in favor of the Freedoms Path Project. After the February hearing, the MBOH staff scored the applications as required by the 2012 QAP. The staff incorrectly reduced the scoring for the Freedoms Path Project to 100 points out of a total of 108. If properly scored, the Freedoms Path Project would have scored either 106 or 107.

On April 5, 2012, Ft. Harrison sent a letter to the MBOH staff requesting a correction to its scoring. The MBOH did not respond in writing, and verbally refused to correct Ft. Harrison’s score for the Freedoms Path Project. In oral conversations, the staff indicated the scoring was intended only to establish whether a project met the threshold score for consideration by the MBOH. According to the 2012 QAP and staff, the MBOH maintains absolute discretion as to whom it would award the LIHTCs.

The MBOH met on April 9, 2012, to choose the recipients of LIHTCs for 2012. The MBOH refused to review the staff's scoring of the Freedoms Path Project and failed to pass a motion to allocate LIHTC to the Freedoms Path Project. The top-scoring applicant received a score of 106 and was awarded the full amount of LIHTCs it requested. The following three applicants received scores of 105 and were also awarded the full amount of LIHTCs they requested. The Freedoms Path Project received no LIHTCs.

On April 23, 2012, Ft. Harrison wrote a letter to the MBOH requesting reconsideration of the decision and rescission of the LIHTC award. At its regularly scheduled meeting on May 3, 2012, the MBOH declined to reconsider its allocation decision. On May 9, 2012, Ft. Harrison filed its petition before the Court.

STANDARD OF REVIEW

“Motions to dismiss are construed in a light most favorable to the non-moving party and should not be granted unless it appears beyond a doubt that the non-moving party can prove no set of facts in support of its claim which would entitle it to relief.” *Stenstrom v. Child Supp. Enforcement Dev.*, 280 Mont. 321, 325, 930 P.2d 650, 652-53 (1996) (citing *Hilands Golf Club v. Ashmore*, 277 Mont. 324, 328, 922 P.2d 469, 471-72 (1996)). “The only relevant inquiry in reviewing a District Court order granting a Rule 12(b)(1) motion to dismiss is whether the complaint, standing alone, sets forth facts which, if true, vest the District Court with subject matter jurisdiction.” *United States Nat’l Bank of Red Lodge v. Dep’t of Revenue*, 175 Mont. 205, 209, 573 P.2d 188, 190-91 (1977). A district court’s decision that it lacks subject matter jurisdiction over a case is a conclusion of law, which is reviewed “to determine whether the court’s interpretation of the law is correct.” *Ashmore*, 277 Mont. at 328, 922 P.2d at 471-72.

Likewise, Montana courts must “construe a complaint in the light most favorable to the plaintiffs when reviewing an order dismissing a complaint under M.R. Civ. P. 12(b)(6).” *McKinnon v. W. Sugar Co-Op. Corp.*, 2010 MT 24, ¶ 12, 355 Mont. 120, 225 P.3d 1221. A court should not dismiss a complaint for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Id.*

ARGUMENT

The Court must deny the MBOH’s motion. In its brief, the MBOH takes the untenable position that its decision is final and cannot be reviewed by any Montana court. It claims absolute discretion to award millions of dollars of tax credits intended for the benefit of low-income Montana residents. The MBOH contends its decisions are immune from judicial oversight because it signed Reservation Agreements with the chosen applicants, who allegedly acted upon those agreements, and unilaterally declared that the hearing guaranteed to Ft. Harrison was not a contested case. This position is in direct conflict with well established principles of Montana law. The MBOH cannot unilaterally remove itself from judicial scrutiny.

The issues in this case are not moot. The Court must reject the MBOH’s conclusory statement regarding the actions of the MBOH and the other applicants. These statements are unsupported and introducing factual allegations in this motion is procedurally improper. Moreover, the Court retains the authority to grant effective relief to Ft. Harrison in this case.

Under Montana law, agencies are held accountable for their decisions through the judicial system, whether it be through MAPA or non-MAPA review. The MBOH’s decision is subject to judicial review pursuant to MAPA because the hearing it conducted meets the definition of a contested case. Alternatively, if the Court finds MAPA does not apply, the MBOH’s decision,

like all agency decisions, is subject to judicial review to determine if it acted in an arbitrary, capricious, or unlawful manner. Failure to properly review an agency's decision is reversible error.

I. THE COURT HAS SUBJECT MATTER JURISDICTION OVER THIS MATTER BECAUSE THE ISSUES IN THIS CASE ARE NOT MOOT.

The MBOH's conclusory statements are irrelevant and procedurally improper in this motion. The only proper consideration for a motion to dismiss, pursuant to Mont.R.Civ.P. 12(b)(1), are the facts as alleged in the petition. *Bank of Red Lodge*, 175 Mont. at 209, 573 P.2d at 190-91. In *Bank of Red Lodge*, the Montana Supreme Court reversed a district court's decision to grant a motion to dismiss pursuant to Mont.R.Civ.P. 12(b)(1). *Id.* at 209, 573 P.2d at 191. There, an agency made "allegations refuting the contentions" in the complaint and claimed the plaintiff had failed to exhaust administrative remedies. *Id.* at 207, 209, 573 P.2d at 189, 191. The district court agreed with an agency and granted the motion. *Id.* at 207, 573 P.2d at 189.

In reversing the district court, the Montana Supreme Court held, "[t]he only relevant inquiry in reviewing a District Court order granting a Rule 12(b)(1) motion to dismiss is whether the complaint, standing alone, sets forth facts which, if true, vest the District Court with subject matter jurisdiction." *Id.* at 209, 573 P.2d at 190-91. As such, the agency "may not, simply by making allegations refuting the contentions" in the complaint "be granted their motions to dismiss." The Supreme Court further held that introducing evidence at this point was procedurally improper. It stated that extrinsic evidence is "irrelevant to our inquiry at this stage of the proceedings." *Id.* at 209, 573 P.2d at 190.

As in *Bank of Red Lodge*, the sole considerations properly before the Court are the facts alleged in Ft. Harrison's petition. The Court cannot consider the MBOH's unsupported allegations to the contrary. The MBOH improperly makes factual assertions that the MBOH

entered into “Reservation Agreements” with the chosen applicants, who then “changed their positions substantially” by “enter[ing] into contractual obligations and ma[king] substantive monetary investments. (Resp.’s Br., p. 7.) Not only are these allegations unsupported by evidence of any kind, as set forth in *Bank of Red Lodge*, the claims themselves and the introduction of any extrinsic evidence is procedurally improper. The Court’s must focus solely on whether Ft. Harrison has alleged facts that grant the Court jurisdiction. Other considerations risk reversible error.

Even if the Court considers the MBOH’s conclusory statements, however, its argument fails because the Court maintains the authority to grant effective relief in this matter. An issue is not necessarily moot merely because the parties cannot be restored to their original positions. *Progressive Direct Ins. Co. v. Stuivenga*, 2012 MT 75, ¶ 37, 364 Mont. 390, 276 P.2d 867. The correct test for whether an issue is moot “whether it is possible for [the] Court to grant effective relief.” *Id.* ¶ 37. In *Stuivenga*, the Supreme Court stated, that the idea an issue is moot “where rights of third persons are involved and the parties cannot be restored to their original position” is merely “dictum . . . which has worked its way into subsequent cases” and “is not entirely accurate.” *Id.* Although that may prevent effective relief in some cases, “it is wrong to suggest . . . that the involvement of third-party interests and the inability to restore the parties to their original positions necessarily moots an appeal.” *Id.*

The MBOH has not provided any reason the Court cannot grant effective relief in this matter. As explained below, the Court has the authority to reverse the MBOH’s decision through judicial review. The Court must reject the MBOH’s claim that the Court “would be unable to grant effective relief or to restore the parties to their original position” because the MBOH signed Reservation Agreements with the chosen applicants who subsequently acted on those

agreements. (Resp.'s Br., pp. 7-9.) The MBOH's claim requires the Court to make determinations that are unsupported by any evidence. For example, the Court would have to consider factors such as: whether the applicants actually relied on the Reservation Agreements, whether the chosen applicants' reliance was reasonable under the circumstances, what they did in reliance, and what is required to return the parties to the status quo. No evidence supporting these determinations has been presented, and the introduction of such evidence is procedurally improper. Simply put, the downstream effects of the Court's ultimate decision are too remote for proper consideration at this stage of the proceedings.

Likewise the Court must reject the MBOH's comparison to *State ex rel. Hagerty v. Rafn*, 130 Mont. 554, 304 P.2d 918 (1956). *Hagerty* is distinct from the present case. In *Hagerty*, the Montana Supreme Court dismissed an appeal for mootness. *Id.* at 561, 304 P.2d at 921. There, the Montana Liquor Control Board complied with a district court order to issue liquor licenses to certain businesses, and at the same time the Board appealed the district court order. *Id.* at 556, 304 P.2d at 919. The Supreme Court held the issue was moot because the businesses had acted on the licenses and the parties could not be returned to their positions before the licenses were issued. *Id.* at 558, 304 P.2d at 920.

Hagerty does not apply in this case for several reasons. Unlike *Hagerty*, the Court maintains the ability to grant effective relief to Ft. Harrison. Unlike the licenses issued in *Hagerty*, the MBOH has not issued LIHTCs and the applicants have not used the LIHTCs. Moreover, the applicants' ability to use the LIHTCs is not ensured, unlike the liquor licenses in *Hagerty*. Rather, the MBOH has entered into Reservation Agreements that do not guarantee the applicants' right to the LIHTCs, most of which were signed before the petition was filed and less than 30 days after the MBOH's initial decision. (Exhibits D, E, F, G, H, I, attached to the

MBOH's brief in support of its motion).¹ If the applicants do not comply with the conditions set forth in the Reservation Agreements, they are not entitled to the LIHTCs. This cannot be determined until all conditions in the Reservation Agreements are met, which cannot occur until the buildings are constructed later in the year.

Finally, from a policy standpoint, the Department's position is untenable. Granting the MBOH's motion on mootness grounds allows the MBOH to control the subject matter jurisdiction of the Court. By simply signing Reservation Agreements immediately after its decisions, the MBOH ensures its decisions will be free of judicial oversight. Permitting the MBOH to stand unaccountable for its actions risks more and more arbitrary and unfair decisions. The Court must ensure the MBOH, like all agencies in Montana, remains subject to the proper standard of review.

II. THE MBOH'S DECISION IS SUBJECT TO JUDICIAL REVIEW UNDER MAPA.

The MBOH is subject to MAPA. MAPA governs the actions of Montana agencies. Agencies are broadly defined as "any board, bureau, commission, department, authority, or officer of the state or local government authorized by law to make rules, determine contested cases, or enter into contracts" §§ 2-4-102; 2-3-102, MCA. The purpose of MAPA is in part to implement safeguards for agency action and create a standard for judicial review. *Id.* § 2-4-101. It also provides statutory directives for agencies to follow. *Id.*

The MBOH's decision is either a contested case or rulemaking under MAPA. MAPA provides that agency actions fall into one of two categories: rulemaking or contested cases. ARM 1.3.211 states, "[a] rule is an agency statement of general applicability that interprets law or describes agency requirements. It applies to all persons who are subject to the requirements or

¹ As explained above, Ft. Harrison objects to the use of these exhibits because it is procedurally improper. However, Ft. Harrison addresses them here because they were cited in the MBOH's brief in support of its argument.

regulations of the agency and comes within the terms of the rule. A contested case involves an agency determination that affects the rights or responsibilities of a specifically named party.”

A contested case is defined by statute as “a proceeding before an agency in which a determination of legal rights, duties, or privileges of a party is required by law to be made after an opportunity for hearing. The term includes but is not restricted to ratemaking, price fixing, and licensing.” § 2-4-102(4), MCA. A rule is defined as “each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy or describes the organization, procedures, or practice requirements of an agency.” *Id.* § 2-4-102(11)(a). MAPA provides for judicial review of both contested cases and rules. *Id.* §§ 2-4-702(1)(a); 2-4-506.

The MBOH’s decision meets the definition of a contested case under MAPA. The MBOH’s decision determines Ft. Harrison’s legal rights, duties, and privileges regarding tax credits. Before the decision was made, Ft. Harrison was entitled to a hearing, pursuant to ARM 8.111.603(3). At this hearing, Ft. Harrison presented the MBOH with evidence and arguments justifying its allocation of tax credits. Accordingly, the MBOH’s decision meets the statutory definition of contested case and is subject to judicial review pursuant to the requirements of MAPA. *See id.* § 2-4-702(1)(a).

The hearing is not barred from being considered a contested case simply because it is created by administrative rule, contrary to the MBOH’s argument. That reasoning erroneously assumes that administrative rules are not considered Montana law. However, administrative rules, such as ARM 8.111.603(3), are “law” in Montana. *See State ex rel. James v. Aronson*, 132 Mont. 120, 140, 314 P.2d 849, 860 (1957). MAPA defines administrative rules as each agency regulation, standard, or statement of general applicability that implements, interprets, or

prescribes law” § 2-4-102(11), MCA (emphasis added). ARM 8.111.603(3) is a legislative rule because it was adopted to implement the allocation of LIHTCs, pursuant to 26 U.S.C. § 42, and the MBOH’s express authority under ARM 8.111.601(1). As such, it carries “the force of law.” *Id.* § 2-4-102(13)(a); *see also Aronson*, 132 Mont. at 140, 314 P.2d at 860.

In its brief, the MBOH misstates the Montana Supreme Court’s holding in *Nye v. Dep’t of Livestock*, 196 Mont. 222, 639 P.2d 498. The MBOH attempts to support its motion by claiming the Montana Supreme Court in *Nye* “held that an agency cannot create a right of judicial review by adoption for policies or administrative rules.” (Resp.’s Br., p. 10.)

Contrary to the MBOH’s argument, the decision in *Nye* does not address administrative rules, and it does not prohibit an agency rules from granting a contested case under MAPA. In *Nye*, the Supreme Court affirmed a district court’s decision that an agency cannot independently create a right of judicial review with its internal personnel policy. *Id.* at 226, 639 P.2d at 500. There, an agency employee filed for judicial review of her termination after the director of the agency refused to follow the recommendations of a grievance committee. *Id.* at 225, 639 P.2d at 500. The internal personnel policy allowed certain employees dissatisfied with the director’s decision to “pursue[an action] at the district court level.” *Id.* at 225-26, 639 P.2d at 500. The policy did not contain a provision regarding a contested case hearing, pursuant to MAPA. The Montana Supreme Court separated its decision into two parts.

The Supreme Court first determined that an agency’s internal personnel policy could not create a direct right of access to the courts. The Supreme Court held “only the legislature may validly provide for judicial review of agency decisions,” and “[a] right of judicial review cannot be created by agency fiat.” *Id.* at 226, 639 P.2d at 500.

Next, the Supreme Court held the phrase “required by law” in the definition of a contested case under MAPA “**includes** situations where a hearing is required as a matter of constitutional right.” *Id.* at 226, 639 P.2d at 501 (emphasis added). The Supreme Court denied the employee’s claim because she “ha[d] cited no authority, either statutory or constitutional” entitling her to a hearing. *Id.*

The case at hand differs from *Nye* in two critical respects. First, unlike *Nye*, this case does not concern internal agency policy. This case concerns an administrative rule, promulgated through the proper MAPA procedures. Accordingly, the decision in *Nye* does not apply to the administrative rule in this case.

Second, unlike the internal policy in *Nye*, which created a right of independent access to the courts, in this case, the administrative rule merely requires a hearing before the MBOH is permitted to make its final decision regarding the LIHTCs. *See* ARM 83.111.603(3). Based upon this hearing, it is MAPA that requires proper judicial review of the MBOH’s decision, not the rule itself. Further, the *Nye* Court’s decision that hearings guaranteed by the Montana Constitution are included in the definition of Montana law does not imply that hearings required by administrative rules cannot qualify contested cases for purposes of MAPA. The term “included” does not exclude other types of law, and *Nye* does not exclude administrative rules specifically.

The Court must also reject the MBOH’s claim that this hearing is not a contested case based on the MBOH’s arbitrary label. In its brief, the MBOH claims, “the rules governing the tax credit allocation process specifically provide that the allocation proceeding is not a contested case hearing under MAPA.” (Resp.’s Br., p. 14.) This simply establishes the MBOH’s process violated MAPA. The MBOH’s allocation process must be conducted under the contested case

provisions. The MBOH's admitted failure to follow those provisions will necessarily require reversal. The MBOH references its own impermissible attempt to circumvent MAPA judicial review by stating "[t]he hearing is not a contested case hearing" in the rule. ARM 8.111.603(5). However, the MBOH fails to cite any authority to suggest it can exempt itself from MAPA. Under Montana law, "[r]ules adopted by administrative agencies which conflict with statutory requirements or exceed authority provided by statute, are invalid." *Haney v. Mahoney*, 2001 MT 201, ¶ 6, 306 Mont. 288, 32 P.3d 1254 (internal quotation marks omitted) (quoting *Taylor v. Taylor*, 272 Mont. 30, 36, 899 P.2d 523, 526 (1995)). The MBOH cannot remove a decision from scope of judicial review simply by stating that its hearing is not a contested case. The hearing in this case meets the statutory criteria set out in MAPA, which governs the determination regardless of the MBOH's label.

Alternatively, if the Court decides the hearing is not a contested case, the MBOH's action falls under the rulemaking provisions of MAPA, which authorize the Court to issue a declaratory judgment invalidating the decision for failure to comply with MAPA rulemaking requirements.

III. ALTERNATIVELY, THE MBOH'S DECISION IS SUBJECT TO NON-MAPA REVIEW.

Even in the absence of MAPA review, the MBOH's decision is subject to non-MAPA review. The Court should reject the MBOH's argument that its decision is free from any judicial oversight. The MBOH claims Ft. Harrison's petition should be dismissed "because there is no right to judicial review of the tax credit allocation." (Resp.'s Br., p. 9.) This statement is patently false and contrary to the three branch system of Montana's government. The rights of those dealing with Montana agencies are ensured by the courts, not the agencies themselves.

Under Montana law, where MAPA review does not apply, courts maintain the authority of judicial review over agency decisions. All agency decisions are subject to judicial review to

determine if the agency “has stayed within the statutory bounds and has not acted arbitrarily, capriciously, or unlawfully.” *Johansen v. Dep’t of Natural Res. and Conservation*, 1998 MT 51, ¶ 26, 288 Mont. 39, 955 P.2d 653 (internal quotation marks omitted) (quoting *North Fork*, 238 Mont. at 457, 778 P.2d at 866). In *Johansen*, the Montana Supreme Court reversed a district court’s decision to dismiss an petition for judicial review because there was no contested case. *Id.* ¶ 31. There, an agency terminated a lease of government land because the lessee failed to timely pay rent. *Id.* ¶ 8. The agency refused to reconsider its decision to terminate the lease or grant the lessee a contested case hearing pursuant to MAPA. *Id.* ¶ 10. The lessee filed a petition for judicial review of the agency’s decision based solely upon MAPA. *Id.* ¶ 25. The district court dismissed the claim, holding that it did not have jurisdiction under MAPA to review the agency’s decision. *Id.* ¶ 14.

The Montana Supreme Court reversed the district court because it failed to perform any type of review of the agency’s decision. Even though the lessee did not specifically request non-MAPA review, the Supreme Court held, “it is the courts’ function to review [an agency’s] decision to determine whether its decision is arbitrary, capricious, unlawful, or unsupported by substantial evidence.” *Id.* ¶ 28.

As in *Johansen*, it would be reversible error for the Court to dismiss Ft. Harrison’s claim without reviewing the MBOH’s decision under the non-MAPA standard. Even if the Court accepts the MBOH’s argument that MAPA does not apply, which Ft. Harrison denies, the Court must review the decision to determine if the MBOH stayed within statutory bounds or acted in an arbitrary, capricious, or unlawful manner.

IV. THE COURT MUST DENY THE MBOH’S REQUEST TO DISMISS THE DECLARATORY JUDGMENT ACTION.

The MBOH’s motion to dismiss Ft. Harrison’s request for declaratory judgment is

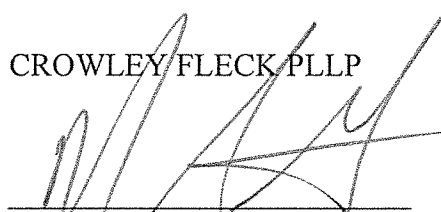
erroneous. The MBOH mistakenly assumes the only way the 2012 QAP does not comply with federal law was by granting the MBOH unchecked discretion to allocate the LIHTCs. (*See* Resp.'s Br., pp. 15-16.) However, while it is true the 2012 QAP impermissibly discards the federally mandated criteria by granting unfettered discretion to the MBOH, the 2012 QAP also infringes on the Commerce Power of the U.S. Congress and fails to comply with mandatory requirements under federal law. The MBOH's failure to account for these claims is fatal to its motion. As with all allegations in the petition, the merits of these claims will be addressed in Ft. Harrison's brief in support of its petition for judicial review.

CONCLUSION

For all these reasons, Ft. Harrison respectfully requests the Court deny the MBOH's motion to dismiss.

Dated this 13th of July, 2012.

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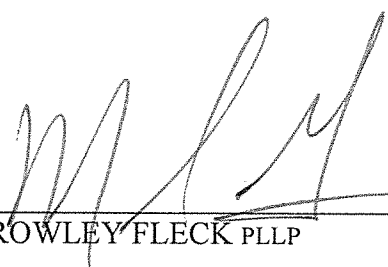
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CERTIFICATE OF SERVICE

I, Michael Green, hereby certify that on the 13th day of July, 2012, I mailed via U.S. Mail a true and correct copy of the foregoing to the following:

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